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Square Pegs in Round Holes: The Washington Courts' Misapplication of Federal Regulatory Takings Law

Jeffrey M. Eustis

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Jeffrey M. Eustis[†]

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† Jeffrey M. Eustis is a partner in the firm of Aramburu & Eustis, LLP and concentrates in land use and environmental law. He graduated from Harvard College in 1970 and obtained his JD degree in 1979 from Seattle University, sub nom, the University of Puget Sound. Mr. Eustis is also an adjunct professor of law at Seattle University where he teaches courses in environmental law and growth management and a frequent lecturer on land use and environmental law.

I. INTRODUCTION

Washington courts have misapplied federal case law under Fifth Amendment of the U.S. Constitution in three respects. First, while Washington appellate courts have purported to apply the tests for finding a regulatory taking under federal law, the Washington courts' articulation of those tests substantially departs from federal jurisprudence and ultimately results in less protection for property rights than accorded by federal law. Second, state court decisions have departed from federal case law by extending the *Nollan*[1] and *Dolan*[2] nexus and proportionality tests beyond the narrow realm of land use permit conditioning and by using those tests as restraints on land use regulation in general. And third, our state courts have inappropriately used the *Nollan* and *Dolan* tests as supplying a constitutional basis for the court's construction of the statutory prohibition against taxes, fees and charges on the development under Chapter 82.02 RCW.

Our courts can correct the misapplication of federal takings law in three ways: (1) by adopting the federal takings tests and abandoning the state's hybrid test; (2) by narrowing the application of the *Nollan* and *Dolan* holdings to circumstances raising the potential for unconstitutional conditions, as recently clarified by the court in *Koontz v. St Johns River Water Management District*;[3] and (3) by uncoupling Chapter 82.02 from Fifth Amendment Takings Doctrine.

This paper begins with an analysis of differences between federal and state tests under the Fifth Amendment and argues for abandonment of the state's hybrid test, as have others. It then discusses the holdings of *Nollan, Dolan*, and *Koontz* in the context of the unconstitutional conditions doctrine and describes how our state courts' application of the *Nollan* and *Dolan* tests beyond the realm of unconstitutional conditions lacks support in federal case law and does not offer a constitutional dimension to RCW Chapter 82.02. And finally, apart from the limitations under Chapter 82.02, the paper identifies those monetary exactions and permit conditioning that would be subject to the nexus and proportionality tests under *Nollan, Dolan,* and *Koontz*, and those that would not.

1. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
2. Dolan v. City of Tigard, 512 U.S. 374 (1994).
3. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 186 L. Ed. 2d 697 (2013).

II. THE STATE'S TEST FOR REGULATORY TAKINGS DEPARTS FROM AND ULTIMATELY WEAKENS FEDERAL STANDARDS FOR REGULATORY TAKINGS.

In 1987, the Washington Supreme Court in *Orion Corp. v. State,*[4] proceeded at great length to address differences between Washington and federal case law on regulatory takings, but in the end resolved to follow the federal analysis.[5] Had the court heeded its resolution, the existing discrepancies between federal and state analyses would not likely have arisen. But as with many resolutions, the initial commitment was short-lived. Subsequent state takings decisions have transformed an effort to follow federal analysis into a mix of takings and substantive due process law that is confusing, difficult to apply, and erects substantial hurdles to a property owner attempting to prove up a takings claim.

Claims of regulatory takings arise under the Takings Clause of the Fifth Amendment of the U.S. Constitution, which in part provides: "[N]or shall private property be taken for public use, without just compensation." A classic taking involves the transfer of property to the state or another public entity by eminent domain.[6] But when the government uses its police power to accomplish the same thing, a taking may also result.[7] The doctrine of regulatory takings has evolved "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property. . . ."[8]

The development of Washington's regulatory takings jurisprudence can be traced through a number of decisions: *Orion Corp. v. State*, *Presbytery of Seattle v. King Cnty.*,[9] and *Guimont v. Clarke*,[10] which each significantly changed the tests for regulatory takings. As noted above, *Orion* attempted to reconcile state and federal analyses. *Presbytery* developed a framework for addressing takings and substantive due process claims.[11] And *Guimont* modified the state takings analysis to account for the holding in *Lucas v. South Carolina Coastal Council*[12] that a regulation denying all economically beneficial use resulted in a *per se* taking. Subsequent to *Guimont*, the state Supreme Court has either

4. Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987).

5. *Id.* at 657-58.

6. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010).

7. *Id.*

8. City of Des Moines v. Gray Businesses, LLC, 130 Wash. App. 600, 619, 124 P.3d 324, 334 (2005) (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005)).

9. Presbytery of Seattle v. King Cnty, 114 Wash. 2d 320, 787 P.2d 907 (1990).

10. Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993).

11. *Presbytery*, 114 Wash. 2d at 329.

12. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

followed *Guimont,* as in *Margola Associates v. City of Seattle,*[13] or addressed takings claims without applying the *Guimont* analysis, as in *Brutsche v. City of Kent.*[14] But the state takings analysis largely remains unchanged since the holding in *Guimont.* Because the evolution of the Washington's regulatory takings analysis has been extensively addressed by others,[15] this article focuses instead on the inconsistencies between the state and federal analyses of regulatory takings.

Federal takings law has undergone its own evolution, developed through such cases as: Penn Cent. Transp. Co. v. New York City;[16] Agins v. City of Tiburon;[17] Nollan, Dolan, Lucas; Monterey v. Del Monte Dunes at Monterey, Ltd.;[18] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency;[19] Lingle v. Chevron U.S.A., Inc.;[20] and most recently, Koontz v. St Johns River Water Mgmt. District. Of these cases, this article discusses in detail the holdings in Nollan, Dolan, Lingle and Koontz and leaves to others the larger topic of the evolution of federal takings law.

Drawing upon what has been analyzed before,[21] this part summarizes the principal discrepancies between state and federal tests for regulatory takings and shows why the state test ultimately provides less protection of private property rights than the federal test. Since it provides context for Washington's rule, the federal analysis is discussed first, followed by a discussion of how the Washington takings analysis conflicts with the very federal law it purports to implement. The

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13. Margola Assoc. v. City of Seattle, 121 Wash. 2d 625, 647, 854 P.2d 23 (1993).

14. Brutsche v. City of Kent, 164 Wash. 2d 664, 680-84, 193 P.3d 110 (2008) (applied the federal test to federal takings claims).

15. *See* earlier articles of Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 368-69 (1989), JEFFREY M. EUSTIS, *Between Scylla and Charybdis: Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limitations*, 16 U. PUGET SOUND L. REV. 1181, 1191-92 (1993). This article draws upon analysis within more recent, post-*Lingle,* articles by Roger Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis,* (*"Wynne"*) 86 WASH. L. REV. 125 (2011) and P. Dayton and L. Clark, *Lingle Lingering: Seven Years after the United States Supreme Court's Lingle v. Chevron USA, Inc., Washington Courts Have Not Reformed the State's Regulatory Takings Test,* 39 ENVTL. & LAND USE LAW (WSBA, May 2012) in contending that Washington's taking analysis is out of step with that applied by the US Supreme Court.

16. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

17. Agins v. City of Tiburon, 447 U.S. 255 (1980).

18. City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 704 (1999).

19. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002).

20. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

21. *See* Wynne, *supra* note 15.

subsequent section discusses the disparate treatment of the holdings in *Nollan* and *Dolan* and the recent decision in *Koontz.*

The U.S. Supreme Court's holding in *Lingle v. Chevron* recognizes three types of regulatory takings: 1) appropriation of land through physical occupation;[22] 2) the deprivation of all economically viable use (unless such deprivation of use results from the application of background principles of nuisance and property law);[23] and 3) those that fail the *Penn Central* three-part test.[24] A regulatory action failing either of the first two tests (physical invasion or denial of all use) results in a *per se* or categorical taking without regard to considerations of countervailing governmental interests.[25] An action passing the categorical tests but nonetheless affecting the use or value of property would be reviewed for its impact upon the specific parcel in question through the *ad hoc* or "as applied" factors adopted by the *Penn Central* court.[26] The extent of a regulation's impact is based upon consideration of the parcel as a whole and not on a regulation's impact upon discreet incidents of ownership or particular portions of the property.[27] The federal takings test is illustrated in the diagram set forth at Appendix A to this paper.

Lingle significantly altered federal regulatory takings law by abandoning a test established 25 years earlier in *Agins v. City of Tiburon* that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate

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22. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). As elaborated upon below, in the subsequent decisions of *Nollan* and *Dolan* the court has upheld permit conditions requiring the dedication of private property for the public use of private property as long as such an exaction demonstrates an "essential nexus," *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), to a legitimate state interest and is "roughly proportional," *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to the impact of the permitted action. As also discussed below, the recent decision in *Koontz* holds that monetary exactions imposed through land use permitting are subject to the *Nollan* and *Dolan* limitations, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 186 L. Ed. 2d 697 (2013).

23. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

24. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (establishing a test involving consideration of three factors: 1) economic impact of the challenged regulation on the property owner); 2) the regulation's interference with investment-backed expectations; and 3) the character of the governmental action).

25. *Lingle*, 544 U.S. at 542.

26. *Id.*(characterizing the three part test as involving "*ad hoc,* factual inquiries" into the impact of the regulation upon the property at issue).

27. Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (finding the deprivation of the right to transfer property, eagle feathers regulated under the Migratory Bird Act, the court held that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."(citation omitted)).

state interests . . . *or* denies an owner economically viable use of his land[.]"[28] The *Lingle* court corrected course and held that the "'substantially advances' formula is not a valid takings test, and . . . it has no proper place in our takings jurisprudence."[29] But as seen below, the "substantially advances" test features prominently in Washington's takings analysis, both before and after the ruling in *Lingle.*

As noted above, the Washington Supreme Court in *Orion* addressed differences between federal and state approaches to regulatory takings. The court's next application of its analysis came in *Presbytery of Seattle v. King County*, in which the court considered *Orion* to have "coordinated"[30] the state and federal tests for regulatory takings. The conclusion that the state and federal analyses of regulatory takings provided the same right of protection also continued through subsequent decisions in *Sintra, Inc. v. City of Seattle;*[31] *Robinson v. City of Seattle;*[32] *Guimont v. Clark;*[33]and *Margola Associates v. City of Seattle*.[34]

The Washington state takings analysis includes the three parts of the federal test but interjects three more tests of its own. The Washington analysis is illustrated in Appendix B to this paper. The state test begins with a threshold inquiry that applies the two *per se* tests of the federal analysis—whether the regulation results in a physical invasion of property and whether the regulation denies the property owner "all economically viable use."[35] And the state test ends with the third part to the federal analysis, consideration of the *Penn Central* factors. But before reaching the *Penn Central* test, the state analysis interjects three additional inquiries, which ultimately result in a lower protection of property rights.[36]

As with the federal test, an affirmative answer to either of the first two inquiries (physical invasion or deprivation of all use) results in a taking. But as part of its initial threshold inquiry, the state broadens parts

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28. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (emphasis added) (citing to a due process case, *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), for the first part of the *Agins* test and to *Penn Cent. Transp. Co.,* 438 U.S. 104, 138, for the second part of the *Agins* test).

29. *Lingle*, 544 U.S. at 548.

30. Presbytery of Seattle v. King Cnty, 114 Wash. 2d 320, 328, 787 P.2d 907 (1990).

31. Sintra Inc. v. City of Seattle, 119 Wash. 2d 1, 14, 829 P.2d 765 (1992).

32. Robinson v. City of Seattle, 119 Wash. 2d 34, 49-54, 830 P.2d 318 (1992).

33. *See* Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993).

34. Margola Assoc. v. City of Seattle, 121 Wash. 2d 625, 646-649, 854 P.2d 23 (1993).

35. *Guimont*, 121 Wash. 2d at 597, 600.

36. Roger Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 134-146 (2011) (describing in greater detail the inconsistencies created by Washington's interjection of three additional elements into the federal takings analysis).

1 and 2 of the federal test by asking more generally whether the regulation would destroy a "fundamental attribute" of property ownership, such as the right to possess, exclude others, or dispose of the property.[37] Under the state's first threshold test, a finding of physical invasion or deprivation of use would result in a *per se* taking, subject of course to the right of the government to show that deprivation of use results from application of background principles of nuisance and property law.[38] Although under *Guimont* a regulation's interference with some other "fundamental attribute" of property (other than the rights to exclude and to make beneficial use) would be considered within the first threshold inquiry, the court has stated that such interference would not result in an automatic, or *per se*, taking, therefore, requiring further analysis under the state's remaining tests for regulatory takings.[39]

If the regulation survives the first threshold inquiry (*i.e.,* no physical invasion, no deprivation of all economic use), the state analysis moves to a second threshold inquiry and asks whether the regulation "seeks less to prevent harm than to impose on those regulated a requirement of providing an affirmative public benefit."[40] If the regulation is shown more to prevent harm than to provide a public benefit (and it does not cause a physical invasion or loss of all use), no taking results and the court does not proceed to the third part of the federal test, application of the *Penn Central* factors,[41] thus insulating the measure from scrutiny of an "as applied" taking and depriving property owners of the opportunity to prove up the third part of the federal takings test. Thus, the second threshold inquiry into considerations of prevention of harm and exaction of public benefits provides a level of insulation of governmental action from claims of regulatory takings.

However, if the regulation does not survive the second threshold test (because it serves more to provide a public benefit than to prevent harm), or if it interferes with some other fundamental attribute of

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37. *Guimont*, 121 Wash. 2d at 594-95; *Margola*, 121 Wash. 2d at 643-45.

38. *Guimont*, 121 Wash. 2d at 602-03 ("If the landowner proves a "total taking"or "physical invasion" has occurred, and if the State fails to rebut that claim, the owner is entitled to . . . just compensation without case-specific inquiry into the legitimacy of the public interest supporting the regulation.").

39. *Id.*at 603 n.6 ("Not every infringement on a fundamental attribute of property ownership necessarily constitutes a 'taking.'"). The court in *Guimont v. City of Seattle* (*Guimont* II), 77 Wash. App. 74, 85 n.6, 896 P.2d 70 (1995), a case challenging as a taking the prohibition of RV trailers in mobile home parks, found the Supreme Court's analysis in the prior *Guimont* decision unclear as to "where the analysis goes if a regulation does not effect a 'total taking' or 'physical invasion' but *does* implicate a fundamental attribute of property ownership."

40. *Guimont*, 121 Wash. 2d at 603.

41. *Id.*

property (apart the right to exclude and to make beneficial use) under the first threshold test, the state analysis interjects a third test into the federal analysis by asking whether the regulation advances legitimate state interests.[42] If not, a taking results.[43] But if the regulation serves to advance legitimate state interests, then the court proceeds with application of the three *Penn Central* factors.[44] Thus, the third inquiry provides another level of insulation for governmental actions from challenges as regulatory takings.

The significant differences between the federal and state tests for regulatory takings make it very difficult to concur with the Washington court's belief that the "comprehensive formula" in *Presbytery* "coordinated" federal and state takings law. In the three respects outlined above the Washington test departs from the federal test and ultimately weakens the Fifth Amendment's protection of property rights. But of course in applying the federal constitution, which the Washington takings cases purport to do, the state court may not substitute its analysis for that of the U.S. Supreme Court.[45] While the state may provide broader protection under the federal constitution, it may not provide for a weaker level of protection.[46]

As described above, the Washington takings analysis inserts three additional inquiries into the federal test, by asking whether the challenged measure: 1) interferes with a fundamental attribute of property; 2) seeks less to prevent harm than to provide an affirmative public benefit; or 3) substantially advances a legitimate state interest. The first inquiry potentially expands the federal categories of *per se* takings beyond physical invasions and deprivation of all use. But the second and third inquiries interject tests that have been abandoned by the U.S. Supreme Court decisions and that ultimately weaken Fifth Amendment protections.

The first of these three additional inquiries alters the federal analysis by potentially expanding the federal test for *per se* takings (physical invasion or denial of all use) to more broadly include the destruction of any fundamental attribute of property, described as including the right to possess, to exclude others, and to dispose of

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42. Presbytery of Seattle v. King Cnty, 114 Wash. 2d 320, 328,333, 787 P.2d 907 (1990); *Guimont*, 121 Wash. 2d at 604.

43. Margola Assoc. v. City of Seattle, 121 Wash. 2d 625, 645, 854 P.2d 23 (1993).

44. *Id.* at 645-46.

45. N.C. v. Butler, 441 U.S. 369, 375-76 (1979); B.F.Goodrich Co. v. State, 38 Wash. 2d 663, 676, 231 P. 2d 325 (1951).

46. State v. Gunwall, 106 Wash. 2d 54, 59, 720 P. 2d 808 (1986).

property.[47] As noted earlier, federal law considers a regulation's impact on the property as a whole, not simply the portion or attribute affected, even with respect to such attributes as the right to transfer.[48] If the first threshold inquiry is used to extend *per se* takings beyond physical invasions and denial of use, it has not been subject to an analysis under *State v. Gunwall.* An analysis under *Gunwall* is necessary for the state to accord greater protection under federal constitutional rights than provided for under federal law.[49]

The second of the state's additional inquiries, whether measures seek more to prevent harm than provide public benefit, serves to insulate governmental action from takings challenges, was rejected by *Lucas,* [50] and plays no part in *Lingle*'s formulation of takings analysis.

And the state's third additional inquiry, whether the measure advances legitimate state interests, interjects a substantive due process test which *Lingle* specifically rejected.[51]

In sum, the state's additional tests for regulatory takings deprive property owners of full protection under the Fifth Amendment and are not legally defensible. Nonetheless, state appellate courts continue to apply those tests even after the decision in *Lingle.*[52] As with other consistencies, resolution lies in correcting course.[53] Quite simply, the

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47. Guimont v. Clarke, 121 Wash. 2d 586, 608, 854 P.2d 1 (1993).

48. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979)

49. The court in *Manufactured Housing Communities of Washington*, 142 Wash. 2d 347, 356-61, 13 P.3d 183 (2000), applied the *Gunwall* analysis to the provision within Article I, section 16 that "[p]rivate property shall not be taken for private use [except in certain listed circumstances]" and concluded that the state's prohibition against taking property for private use offered broader protection than the Fifth Amendment. However, the Washington courts have not conducted a *Gunwall* review of the three unique parts to Washington's analysis of takings under the Fifth Amendment. Moreover, *Presbytery* and *Guimont* do not give full first threshold treatment to the interference with fundamental attributes of property other than invasions and deprivation of all use, since the court does not consider such interferences to automatically amount to *per se* takings. *See* Presbytery of Seattle v. King Cnty, 114 Wash. 2d 320, 334 n.21, 787 P.2d 907 (1990); *Guimont* at 603 n.6.

50. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992) (characterizing the harm/benefit distinction as "difficult, if not impossible, to discern on an objective, value-free bases").

51. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005).

52. In *City of Des Moines v. Gray Businesses, LLC*, 130 Wash. App. 600, 331, 124 P.3d 324 (2005), the court denied a regulatory takings challenge of a mobile home park restriction under Washington takings test, but noted at footnote 33 that the holding in *Lingle* had removed the "substantially advances" test from federal takings law. In *Thun v. City of Bonney Lake,* 164 Wash. App. 755, 760 fn. 4, 265 P.3d 207 (2011), the court acknowledged the *Lingle* decision, but applied the Washington test in denying a takings challenge to the rezoning of property from commercial to residential use.

53. *See In re* Stranger Creek & Tributaries in Stevens Cnty., 77 Wash. 2d 649, 653, 466 P.2d 508 (1970) (recognizing that the court may abandon an established rule of law upon a "clear

state could conform its analysis of Fifth Amendment with federal law by adopting the tests for regulatory takings under *Lingle.* In the recent appeal in *Lemire v The Pollution Control Hearings Board, et al.,*[54] *amicus* briefs argued for the adoption of the federal tests, but the court chose not to revisit its takings analysis on grounds that the facts of the case failed to support claims of a taking.

Inconsistencies between state and federal application of takings law are not limited to the federal three-part test for takings, but also arise in application of the first part of the federal test, which protects private property from physical invasions. These inconsistencies are addressed in the next section of this paper.

III. THE STATE MISAPPLIES THE *NOLLAN* AND *DOLAN* LIMITATIONS.

A. Nollan and Dolan apply within the narrow doctrine of unconstitutional conditions.

The *Nollan* decision often is advanced for the proposition that to conform to limitations under the Fifth Amendment of the US Constitution a regulation on the use of land must demonstrate an "essential nexus" to the perceived harm of the proposed development. The decision in *Dolan* frequently is offered for the proposition that the extent of land use regulation must be "roughly proportional" to the impacts of anticipated development. In actuality, neither holding applies universally to all forms of regulation. As clarified by the 2005 decision in *Lingle* and the 2013 decision in *Koontz,* the *Nollan* and *Dolan* holdings are limited to circumstances involving the exaction of conditions in the review of land use permits.

In *Nollan,* the claimants acquired a California oceanfront lot located between two parks. An eight-foot-high seawall divided the lot into two portions: an upland area extending from a seawall back to a road, and a beach area extending from the seawall to the Pacific Ocean. The Nollans desired to replace a small cottage with a modern three-bedroom house.

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showing" that the rule is "incorrect and harmful."); s*ee also Lingle,* 544 U.S. at 548 (abandoning 25 years of application of the "substantially advances" test within takings analysis, the court "correct[ed] course").

54 Lemire v. Dep't of Ecology, 178 Wash. 2d 227, 242, 309 P.3d 395 (2013). A number of organizations submitted an *amicus* brief urging the court to abandon the state's takings analysis and adopt the federal test in its place. Although, the author of this paper is among the co-signers to that brief, credit is owed to its principal author, Roger Wynne, writing on behalf of the Washington State Association of Municipal Attorneys.

When they sought necessary permits, the California Coastal Commission required that they dedicate an easement for public use across the beach portion of their lot. According to the Commission, the requested easement served to make it easier for the public to travel between the two parks. The Nollans challenged the easement requirement through the state court system and ultimately to the United States Supreme Court.

In striking down the easement condition the court reasoned as follows: in the absence of the permit, the Commission could not lawfully exact an easement without exercising eminent domain; in order to exact the easement as a condition of the building permit, the easement would need to address some impact that would warrant denial of the permit; and since the easement served to facilitate public access across the Nollan's property and did not address any impact created by the house itself, the court found no "essential nexus" between the exacted easement and any public problem created or exacerbated by the new house.[55] Thus, it concluded that the Commission could not exact the easement without compensation.

The decision in *Dolan v. City of Tigard* also addressed the constitutionality of a development condition requiring the dedication of an easement for public use. Mrs. Dolan operated a hardware store with a gravel parking lot on 1.6 acres in the central business district of Tigard, Oregon. A creek traversed the site. Dolan applied for a permit to double the size of the store, pave a parking lot, and build another commercial building. The city conditioned the necessary permits on dedication of: (a) the creek's floodplain for use as a drainage and flood control area, (b) the creek's floodplain for use as a public recreational area, and (c) a strip of land for a pedestrian/bicycle pathway. Dolan appealed, claiming that the city had not identified any "special quantifiable burdens" to justify the required dedications.

After proceeding through the state court system, the case reached the United States Supreme Court where the court posed the question: "What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development?"[56] To this, it provided the following answer:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedica-

55. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-37 (1987).
56. Dolan v. City of Tigard, 512 U.S. 374, 375 (1994).

> tion is related both in nature and extent to the impact of the proposed development.[57]

Both *Nollan* and *Dolan* began with the premise that the government's direct appropriation of the easements would have been a *per se* physical taking.[58] Accordingly, each case addressed the question of whether the government could, without paying compensation otherwise required by the Fifth Amendment, demand the easement as a condition for granting the development permits. The *Nollan* court answered affirmatively, provided that the dedication would substantially advance the same governmental interest that would furnish a valid ground for denial of the permit.[59] The *Dolan* court refined this requirement, holding that an exaction requiring the dedication of private property must also be roughly proportional "both in nature and extent to the impact of the proposed development."[60] The *Dolan* court found the dedication of an easement for drainage and flood control to satisfy this requirement, but that the dedications of the public recreation area and the pedestrian pathway did not.

In the subsequent decision of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,*[61] the Supreme Court initially limited the *Nollan* and *Dolan* tests to exactions of dedications of land. In a case involving challenges to multiple delays in permitting, the court refused to extend the *Nollan* and *Dolan* tests beyond the exaction of conditions requiring the dedication of private property for public use.[62]

Six years after the decision in *Del Monte Dunes* the court in *Lingle v. Chevron U.S.A. Inc*.[63] further narrowed the application of the *Nollan* and *Dolan* tests to adjudicative decisions resulting in the imposition of unconstitutional conditions. As noted above, *Lingle* reversed 25 years of takings jurisprudence by discarding the test enunciated in *Agins v. City of Tiburon*[64] that a regulation may effect a taking if it does not substantially advance legitimate state interests.[65] In addressing the impact of its holding upon prior takings decisions, the court limited the application of *Nollan* and *Dolan* to the narrow doctrine of "unconstitutional conditions":

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57. *Id.* at 391.
58. *Id.* at 384; *Nollan*, 438 U.S. at 831-32.
59. *Nollan*, 483 U.S. at 834-37.
60. *Dolan*, 512 U.S. at 391.
61. City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 702-703 (1999).
62. *Id*. (emphasis added).
63. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).
64. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980).
65. *Lingle*, 544 U.S. at 545.

> Although *Nollan* and *Dolan* quoted *Agins'* language, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. *As the Court explained in Dolan, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'*" which provides that "the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.[66]

The *Lingle* decision narrows the *Nollan* and *Dolan* holdings in at least three respects: (1) it abandons the *Agins* "substantially advances" test, and consequently use of the Takings Clause to scrutinize the interests served by legislation; (2) it recasts those decisions as applications of the unconstitutional conditions doctrine; and (3) it limits the heightened scrutiny of the nexus and proportionality tests to the "adjudicative" imposition of permit conditioning, as opposed to legislatively-enacted land use regulations of broad applicability.[67]

B. Koontz expands the Nollan and Dolan tests to denials of land use permits and to monetary exactions.

In the 2013 decision of *Koontz v. St Johns River Water Management District*, the US Supreme Court reaffirmed application of the *Nollan* and *Dolan* standards to the imposition of unconstitutional conditions but broadened their application in two respects: 1) to preconditions for permit approvals; and 2) to permit conditions requiring the

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66. *Id.* at 547-48 (emphasis added) (internal citations omitted).

67. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (applying the holding to an "adjudicative decision" conditioning petitioner's property, as opposed to "legislative determinations classifying entire areas of the city"); *See also* Daniel L. Siegel, *Exactions after Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L. J. 577, 611 (2009) ("It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the *sine qua non* for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.").

payment of money, as opposed to the dedication of interests in land as had occurred in *Nollan* and *Dolan*. While *Koontz* provides answers to questions left open by *Nollan* and *Dolan*, it raises several new issues, such as the nature of permit denials and types of permit conditions that could trigger a *Koontz* challenge and the types of fees and charges that would be subject to *Nollan* and *Dolan* review. But *Koontz* does not support expansion of the unconstitutional conditions doctrine as a litmus test for all manner of land use legislation.

The *Koontz* appeal arose from a challenge to the ability of the St Johns River Water Management District to impose permit conditions requiring the dedication of a conservation easement and the improvement of off-site lands held by the Water District. The applicant, Coy Koontz, Sr., who was represented in the appeal by his estate, had applied to develop 3.7 acres of a 14.9 acre tract consisting mostly of wetlands.[68] As a condition for wetland fill, Koontz offered to dedicate to the Water District a conservation easement covering eleven acres of the site.[69] But the Water District regarded the proposed mitigation as insufficient and requested the applicant to agree to either of two additional conditions: a reduction of the area of impact to one acre together with dedication of a conservation easement; or improvement of a Water District site several miles away.[70] Although the Water District did not issue a permit decision that included either of these conditions, Koontz challenged the Water District's position as excessively burdening his property.[71] Following appeals, a remand, and further appeals in the Florida state courts, Koontz ultimately sought and gained Supreme Court review.[72]

The Supreme Court considered two issues: whether the essential nexus and rough proportionality standards of *Nollan* and *Dolan* applied to conditions precedent for the issuance of a development permit; and whether those standards applied to permit conditions requiring the payment of money, as opposed to just the dedication of possessory interests as had occurred in *Nollan* and *Dolan*.

On the first question, all justices agreed that a demand for property "must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit [.]"[73] The Court recognized that the Fifth Amendment mandates just compensation only for takings, but in cases

68. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591-92 186 L. Ed. 2d 697 (2013).

69. *Id.* at 2592-93.

70. *Id.* at 2593.

71. *Id.*

72. *Id.* at 2593-94.

73. *Id.* at 2599.

involving permit denials "nothing has been taken."[74] So rather than presenting a claim for just compensation under the Fifth Amendment, the court considered Koontz's challenge to be an "unconstitutional conditions claim predicated on the Takings Clause."[75] Having recognized the inapplicability of just compensation, the court deferred to the Florida court a determination of available remedies for the imposition of unconstitutional conditions.[76] The Court also declined "to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan.*"[77]

On the second question, a 5-4 majority ruled that a permit condition requiring the payment of money must also satisfy the nexus and proportionality tests.[78] The majority began by acknowledging that "[t]axes and user fees . . . are not takings."[79] The court distinguished the Water District's proposed condition requiring the expenditure of funds from the requirement to provide health benefits to retired miners, which it determined not to be a taking in *Eastern Enterprises v. Apfel.*[80] The Court drew this distinction on grounds that the condition in *Koontz* was "linked to a specific, identifiable property interest" and concluded the monetary demand "would amount to a *per se* taking similar to the taking of an easement or a lien."[81]

Although the Court declined to identify the types of payments to which its holding would apply,[82] it did observe that the decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[83] The Court's refusal to more specifically identify the dividing point between those monetary exactions that would be subject to the nexus and proportionality tests and those that would not leave much room for debate.

The dissent, authored by Justice Kagen, and joined by Justices Ginsburg, Breyer and Sotomayor, agreed with the majority on the first issue that the *Nollan-Dolan* standard applies to conditions precedent to

74. *Id.* at 2597.
75. *Id.*
76. *Id.*
77. *Id.*at 2598.
78. *Id.* at 2603.
79. *Id.* at 2600-01 (internal quotations and citations omitted).
80. E. Enter. v. Apfel, 524 U.S. 498 (1998).
81. *Koontz*, 133 S.Ct. at 2600 (citations to *Dolan* and *Nolan* omitted).
82. *Id.* at 2602.
83. *Id.* at 2601.

the granting of development permits.[84] On the second issue, the dissent argued that the heightened scrutiny of the *Nollan* and *Dolan* decisions did not apply to the conditioning of development approval upon the payment or expenditure of money, instead maintaining that challenges to such exactions as takings should be reviewable under the *Penn Central* test.[85] The dissent agreed with the majority that the *Nollan-Dolan* standard applies only when demands are made during the permitting process that would otherwise require compensation (the rationale for each of those holdings), but reasoned that the Water District's suggested condition of improvement to off-site property should not be subject to *Nollan-Dolan* scrutiny since such a condition would not have amounted to taking had it been made in the absence of permitting.[86] The dissent concluded that the Water District had never required anything of Koontz (it had simply suggested conditions to bring the application into compliance with regulatory standards), that Koontz had never given up anything, so that nothing had been taken and the prohibition against unconstitutional conditions should not even apply.[87]

In sum, following the holding in *Koontz* the heightened essential nexus and rough proportionality tests apply to: 1) conditions adjudicatively imposed through permitting, as opposed to legislatively-enacted regulations of broad applicability; 2) conditions imposed for permit receipt, as well as those for permit compliance; 3) conditions requiring the granting of possessory interests in land; and 4) conditions requiring the expenditure of money that is linked to a specific, identifiable property interest. However, the heightened scrutiny under *Nollan, Dolan, and Koontz* would not apply to property taxes, user fees and similar requirements imposing financial burdens on property owners. Regarding remedies, since *Nollan, Dolan,* and *Koontz* claims arise through challenges to permit conditions, relief may lie through the removal of the challenged conditions, as opposed to the payment of just compensation.[88] The *Koontz* court leaves to state law the availability of damages for the imposition of conditions found to be unconstitutional.

The next section examines how the *Koontz* decision may affect Washington courts' application of the holdings in *Nollan* and *Dolan.*

84. *Id.* at 2603.
85. *Id.* at 2604.
86. *Id.* at 2605-06.
87. *Id.* at 2612.
88. *Id.* at 2600 n.2, 2603 (Justice Kagen concurring).

C. Washington Courts' Expansive Application of Nollan and Dolan

Prior to *Koontz,* Washington courts departed from federal decisions by extending the holdings in *Nollan* and *Dolan* beyond circumstances involving dedications of land (the original context of *Nollan* and *Dolan*) to cases challenging the imposition of development fees and the reasonableness of development regulations. The *Koontz* decision now offers Washington courts a fresh opportunity to conform their application of *Nollan* and *Dolan* to federal case law.

Any effort by the state to conform to federal case law must recognize that the *Nollan*, *Dolan* and *Koontz* decisions emerged from the application of the doctrine of unconstitutional conditions and not directly from the Fifth Amendment.[89] To date, state court decisions have not qualified the application of the *Nollan* and *Dolan* as a manifestation of the unconstitutional conditions doctrine, or even applied the doctrine of unconstitutional conditions outside of the realm of criminal law.[90]

1. Application of *Nollan* and *Dolan* to dedications

Several cases have applied the essential nexus and rough proportionality tests to conditions requiring the dedication of land. In *Sparks v. Douglas County,*[91] the court upheld the dedication of additional right of way under *Nollan* and *Dolan* as necessary to accommodate additional traffic from sixteen new lots created by four adjacent subdivisions. In *Burton v. Clark County,*[92] the court found that a condition requiring the dedication of land for the continuation of a public road through a three-lot subdivision of land failed the rough proportionality test under *Dolan*. And in *Benchmark Land Co. v. City of Battle Ground,*[93] the state Supreme Court reversed the Court of Appeals' application of the *Nollan* and *Dolan* tests in a challenge to a condition requiring the dedication of right of way for a street that would not actually serve the proposed development. The court sidestepped the constitutional issue by voiding the dedication on procedural grounds, that it lacked support by substantial evidence.

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89. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547-48 (2005).

90. *See e.g., In re* Dyer*,* 175 Wash. 2d 186, 203-04, 283 P.3d 1103 (2012) (rejecting unconstitutional conditions challenge to parole board recommendation); Butler v. Kato, 137 Wash. App. 515, 532, 154 P.3d 259 (2007) (finding conditions of pre-trial release to be barred under doctrine of unconstitutional conditions).

91. Sparks v. Douglas Cnty., 127 Wash. 2d 901, 917, 904 P.2d 738 (1995).

92. Burton v. Clark Cnty., 91 Wash. App. 505, 958 P.2d 343 (1998).

93. Benchmark Land Co. v. City of Battle Ground, 146 Wash. 2d 685, 49 P.3d 860 (2002).

Although the Washington courts treated each of these cases as involving takings challenges, as opposed to the attempted exaction of unconstitutional conditions, their holdings appear to conform to federal decisions applying the *Nollan* and *Dolan* standards to exactions of possessory interests, including the most recent decision in *Koontz*.

2. Application of *Nollan* and *Dolan* to fees in lieu of dedications

Well before *Koontz,* Washington courts applied the *Nollan* and *Dolan* standards to development conditions requiring the payment of fees in lieu of the dedication of land, but they have done so to further buttress the application of the state's statutory limitations on development fees under RCW Chapter 82.02, and not as a separate, federal constitutional ground for upholding or invalidating the development fees at issue. To place this distinction into its statutory context, a brief review of RCW Chapter 82.02 follows.

RCW Chapter 82.02 provides authority for and limitations upon the ability of local governments to impose taxes and fees on the permitting and development of land. As this chapter was amended in 1982, RCW 82.02.020 largely prohibited local governments (counties, cities and towns) from imposing taxes, fees, and other charges upon land development. The prohibition against taxes on land development emerged as a compromise under which local governments were given additional taxing authority.[94] The prohibition against taxes, fees, and charges on development is codified at RCW 82.02.020 and presently reads in part as follows:

> Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any *tax, fee, or charge*, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.[95]

The section goes on to allow three exceptions to the general prohibition of "any tax, fee, or charge" upon the development of land: 1) dedications within the development "reasonably necessary as a direct result of the proposed development"; 2) voluntary payments in lieu of the dedication of land; and 3) voluntary payments to mitigate direct impacts of the

94. 1982 Wash. Sess. Laws 1547, 1550. *See also* Martha S. Lester, *Subdivision Exactions in Washington: The Controversy over Imposing Fees on Developers*, 59 WASH. L. REV. 289 (1984).

95. WASH. REV. CODE § 82.02.020 (2013) (emphasis added).

proposed development.[96] RCW 82.02.020 was enacted in response to a challenge to impact fees in the then pending case of *Hillis Homes v. Snohomish Cnty.*[97]

Amendments to Chapter 82.02 adopted in 1990 as part of the Growth Management Act (GMA, or "the Act")[98] authorized those

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96. RCW 82.02.020 provides in relevant part:

> Except only as expressly provided in chapters 67.28 and 82.14 RCW, the state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, parimutuel wagering authorized pursuant to RCW 67.16.060, conveyances, and cigarettes, and no county, town, or other municipal subdivision shall have the right to impose taxes of that nature. Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. A local government shall not use such voluntary agreements for local off-site transportation improvements within the geographic boundaries of the area or areas covered by an adopted transportation program authorized by chapter 39.92 RCW. Any such voluntary agreement is subject to the following provisions:
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> (1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;
>
> (2) The payment shall be expended in all cases within five years of collection; and
>
> (3) Any payment not so expended shall be refunded with interest at the rate applied to judgments to the property owners of record at the time of the refund; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.
>
> No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation cannot establish is reasonably necessary as a direct result of the proposed development or plat. WASH. REV. CODE §82.02.020 (2013).

97. Hillis Homes, Inc. v. Snohomish Cnty., 97 Wash. 2d 804, 811, 650 P. 2d 193 (1982); *See* Donya Williamson, Note, *Urbanites versus Rural Rights; Contest of Local Government Land-Use Regulations under Washington Preemption Statute 82.02.020,* 84 WASH. L. REV. 491, 502 (2009).

98. The Growth Management Act, principally codified at WASH. REV. CODE § 36.70A, establishes mandatory planning requirements for counties and cities that are either required to plan on account of their populations or growth rates or have voluntarily opted to plan under the Act. WASH. REV. CODE § 36.70A.040(1) - (2). For a review of the genesis and requirements of the Act, s*ee* Settle & Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U. PUGET SOUND L. REV. 867 (1993).

counties and cities planning under the Act to impose impact fees to fund system improvements reasonably related to proposed land use developments.[99] Implementing such authority requires a county or city to adopt separate impact fee legislation. Impact fees then result from the application of objective fee schedules and are not simply determined on an *ad hoc* basis.[100]

As applied through Chapter 82.02, Washington courts have determined the *Nollan* and *Dolan* standards to be applicable to the limitations on local tax authority under RCW 82.02.020, but not to impact fees authorized under RCW 82.02.050-.090.[101] In *Trimen Dev. Co. v. King Cnty*,[102] the court upheld the imposition of park fees under RCW 82.02.020 based upon an adopted formula that calculated requirements for the dedication of additional park area on a per lot basis and allowed the payment of fees in lieu of the actual dedication of land. In concluding that the park fees met the standard under RCW 82.02.020 of being "reasonably necessary as a direct result of the proposed development or plat[,]" the court cited the "rough proportionality" language under *Dolan.*[103]

In *City of Olympia v. Drebick,*[104] the court rejected a challenge to impact fees enacted under RCW 82.02.050 -.090. The court's analysis concluded that the heightened scrutiny of *Nollan/Dolan* was inapplicable on grounds it did not apply to "general growth impact fees imposed pursuant to statutorily authorized ordinances."[105] Consistent with this holding, the Court of Appeals in *City of Federal Way v. Town & Country Real Estate, LLC*,[106] regarded *Nollan* and *Dolan* as applicable only to "fees in lieu of possessory exactions," but not to GMA impact fees under RCW 82.02.050 -.090.

Even though the legislature in 1982 plainly could not have enacted RCW Chapter 82.02 in response to *Nollan* or *Dolan* (decided in 1987 and 1994, respectively), the exaction of "voluntary" impact fees

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99. 1990 Wash. Sess. Laws 42-44, 46-48.

100. *See* WASH. REV. CODE §§ 82.02.050 (4), 060(1) (2013).

101. Although codified under statutes authorizing excise taxes, the provisions set forth at WASH. REV. CODE §82.02.050-.090 were enacted by the same session law adopting the Growth Management Act. These provisions grant to those counties and cities planning under the Act the authority to adopt and to implement ordinances requiring the payment of fee to off-set the impacts of development.

102. Trimen Dev. Co. v. King Cnty., 124 Wash. 2d 261, 274, 877 P.2d 187 (1994).

103. *Id.* at 274.

104. City of Olympia v. Drebick, 156 Wash. 2d 289, 301–03, 126 P.3d 802 (2006).

105. *Id.* at 302.

106. City of Federal Way v. Town & Country Real Estate, LLC, 161 Wash. App. 17, 45, 252 P.3d 382 (2011).

consistent with the standards of RCW 82.02.020 would likely survive a *Koontz* challenge since such exactions would need to satisfy the statutory requirement that they be "reasonably necessary as a direct result of the proposed development."

The imposition of GMA impact fees presents a closer question. Under the limited guidance in *Koontz,* there are at least two reasons why "general growth impact fees imposed pursuant to statutorily authorized ordinances," as termed by *Drebick,* should not be subject to heightened review under *Nollan, Dolan,* and *Koontz*. First, the imposition and magnitude of such fees are determined not on an *ad hoc* basis through permit conditioning, but rather through legislatively-enacted fee schedules, to which the unconstitutional conditions doctrine would not apply.[107] And second, such general growth impact fees are either specifically authorized as an exercise of local taxing authority under RCW 82.02.050 *et seq.*, or alternatively, they are exempt from *Koontz* because they result from the application of "similar laws and regulations that may impose financial burdens on property owners."[108]

Even still, whether GMA impacts fees and other restrictions on land development that are based upon legislatively-adopted regulations, but imposed through permitting escape review under *Nollan, Dolan,* and *Koontz* is likely to be debated. The review of land use applications frequently involves the imposition through permitting of legislatively proscribed impact fees, environmental mitigations, development conditions, and other restrictions.[109] Although impact fee schedules and other mitigation measures are set forth in legislation, the magnitude of impact fees and the extent of mitigations typically are established through permitting. The imposition of such mitigations may be claimed to be an exercise of adjudicative conditioning and therefore subject to scrutiny under *Nollan, Dolan,* and *Koontz.* An analysis more consistent with those holdings would treat the imposition of legislatively-based mitigations as exempt from heightened scrutiny since such conditions

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107. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (applying the holding to the "adjudicative" conditions, as opposed to "legislative determinations" applicable to entire areas of a jurisdiction).

108. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2601, 186 L. Ed. 2d 697 (2013).

109. For example, the King County Code at section 21A.24.325 contains standardized requirements for wetland buffers, *available at* http://your.kingcounty.gov/mkcc/clerk/code/24-30_Title_21A.pdf. For the calculation of traffic mitigation fees for single and multi-family development, the King County code at section 14.75.040 provides a table of fees which varies by geographical region of the county, *available at* http://your.kingcounty.gov/mkcc/clerk/code/17_Title_14.pdf .

result from regulations enacted through the checks and balances of the legislative process and not imposed through the unbridled discretion of permit reviewers.[110]

3. Application of *Nollan* and *Dolan* to non-possessory set asides

Washington courts have also applied the *Nollan-Dolan* standards to land use conditions requiring the set aside of lands for open space, even in the absence of a formal dedication to the public or to public use. In *Isla Verde v. City of Camas*,[111] the Court of Appeals found to be a taking under *Nollan-Dolan* a requirement that a subdivision set aside 30% of its site as open space, even though no public dedication was required. The state Supreme Court rejected the Court of Appeals' extension of *Nollan* and *Dolan* by finding the open space requirement invalid on statutory, not constitutional, grounds as a violation of RCW 82.02.020.[112]

Even though the Supreme Court observed that the Court of Appeals "should not have reached the constitutional issue,"[113] the Court of Appeals' invalidation of the open space requirement under the nexus and proportionality tests would exceed the reach of those tests since the open space condition was imposed through application of legislatively-adopted standards and not devised through permit conditioning. Moreover, the open space requirement did not exact a possessory interest in land, as in *Nollan* and *Dolan,* and it did not require the payment or expenditure of funds to improve land in lieu of a dedication, as in *Koontz.*

The test for the exaction of unconstitutional conditions in *Isla Verde* would be whether the imposition of a requirement for 30% of a development to be set aside as open space would amount to a taking in the absence a permitting condition. Under established case law, a requirement that 30% of a site be retained in open space would not differ in principle from other restrictions limiting the extent of land development that have been upheld under the *Penn Central* test.[114]

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110. *Dolan*, 512 U.S. at 385; Daniel L. Siegel, *supra* note 67.

111. Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wash. App. 127, 130-31, 990 P. 2d 429 (1999).

112. Isla Verde Int'l Holdings v. City of Camas*,* 146 Wash.2d 740, 49 P.3d 867 (2002).

113. *Id.* at 752.

114. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (finding 94 percent diminution in value insufficient to support a takings claim from rejection of a residential subdivision on 11 of a 20 acre site that contained 18 acres of wetlands); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978) (noting that diminution in values of 75 percent in *Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926) and 87.5 percent *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) did not amount to takings).

4. Application of *Nollan* and *Dolan* to critical areas and shoreline regulations

Our state courts' application of *Nollan* and *Dolan* to legislatively adopted limitations on development in GMA environmentally critical areas (wetlands, riparian corridors, frequently flooded areas, geologically hazardous areas and aquifer recharge areas)[115] and shorelines lacks support under *Nollan* and *Dolan*, even as amplified by *Koontz.*

In *Honesty in Envtl. Analysis & Legislation v. Central Puget Sound Growth Hearings Bd. ("HEAL"),*[116] the Court of Appeals addressed *Nollan* and *Dolan* in a challenge to an ordinance enacted under the GMA to protect environmentally sensitive areas. In a passage acknowledged to be *dicta*, the court opined that the lack of support of development regulations by best available science could subject permit decisions based upon those regulations to scrutiny under the *Nollan* and *Dolan* tests:

> The briefs of the parties omit any discussion of an important constitutional limitation on local government's discretion in adopting policies and regulations under GMA. Those policies and regulations are implemented only when they are applied to applications for permits. And under the State Environmental Policy Act, RCW 43.21C, a local government may impose development conditions and deny applications only if it first adopts policies and implementing regulations like those at issue here, as a basis for exercising that authority. RCW 43.21C.060. Therefore, the policies and regulations adopted under GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited.[117]

As happens with *dicta*, the language from *HEAL* has taken on a life of its own and received application in subsequent cases. In *Kitsap Alliance of Prop. Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.* (*"KAPO"*),[118] the court cited to *HEAL* as establishing the

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115. WASH. REV. CODE §36.70A.030 (5) (2013). (Definition of GMA defined environmentally critical areas).

116. *Honesty in Environmental Analysis and Legislation ("HEAL") v. Cent. Puget Sound Growth Management Hearings Bd.,* 96 Wash. App. 522, 533-535 (1999).

117. *Id*. at 533.

118. Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,160 Wash. App. 250, 273, 255 P.3d 696 (2011) *review denied,* 171 Wash. 2d 1030 (2011).

proposition that GMA regulations must comply with the nexus and rough proportionality tests, even though the court ultimately found those standards to be met.

KAPO petitioned the U.S. Supreme Court on asserted grounds that shoreline buffers and setbacks amounted to the dedication of private lands for public use, but the Court declined review.[119] Regardless of the reason for the court's denial, application of the *Nollan/Dolan* standards to legislatively-imposed shoreline setbacks not involving either the dedication of land to public use or the payment of in lieu fees would clearly exceed the application of those standards under federal case law.

Under the legislative/adjudicative distinction, limitations placed upon the development of shorelines and other environmentally sensitive areas would not be subject to heighted scrutiny under *Nollan, Dolan,* and *Koontz* because they are imposed through regulations that are subject to the checks of the legislative process and not through conditions devised on an *ad hoc* basis by permit reviewers.[120]

5. Application of *Nollan, Dolan,* and *Koontz* to financial burdens imposed by taxes, user fees, and similar laws and regulations.

While the *Koontz* majority recognizes that "taxes and user fees . . . are not takings,"[121] it refuses to identify the line between those fees that would be subject to review under *Nollan* and *Dolan* and those that would not.[122] Apart from impact fees imposed under RCW 82.02.020 and 82.02.050 as discussed above, local governments frequently impose other financial obligations upon new developments, such as through utility connection charges, requirements to upgrade storm water controls, fees to improve transportation systems, and mitigations under the State Environmental Policy Act (SEPA).

The generality of the Court's assurance that the decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on

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119. Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 132 S. Ct. 1792 (2012).

120. Daniel L. Siegel, *supra* note 67, at 611-12 (observing that the deployment of discretionary authority in permit conditioning prompts the heighted scrutiny under *Nollan* and *Dolan* and that the legislative process offers protections for landowners from regulations of general applicability. *But see* Winfield B. Martin, *Order for the Courts: Reforming the Nollan/Dolan Threshold Inquiry for Exactions,* 35 SEATTLE U. L. REV. 1499, 1517-18 (2012) (arguing for a balancing test under which the heightened scrutiny of *Nollan* and *Dolan* would also apply to legislatively-enacted regulations).

121. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2600, 186 L. Ed. 2d 697 (2013).

122. *Id.* at 2602.

property owners[,]"[123] provides little guidance as to the types of fees and financial burdens subject to review under the unconstitutional conditions doctrine. However, pre-*Koontz* decisions in Washington at least offer some standards for distinguishing between taxes and regulatory fees, an important distinction since *Koontz* apparently grants greater latitude for taxes. Those decisions also offer some assurance that regulatory fees would either avoid review or at least survive scrutiny under the *Nollan* and *Dolan* standards.

In distinguishing between taxes and regulatory fees the court in *Covell v. City of Seattle* applied three factors: (1) whether the primary purpose is to raise revenue or to regulate; (2) whether the money collected must be allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.[124] To be characterized as a regulatory fee, and avoid the constitutional limitations applicable to the taxation of land, the primary purpose of the charge must be regulatory, as opposed to revenue raising, the funds must be allocated to the regulatory purpose, and the fee charged must be related to the benefits or burdens provided to or produced by the fee payers.[125]

Under the general distinction as to whether the purpose of the fee is to raise revenue or to regulate land use, courts have determined a street utility charge to be a tax,[126] but a storm water charge,[127] a water service connection charge,[128] and a fire district benefit charge[129] to be regulatory fees. Without determining them to be taxes, the courts have characterized school[130] and transportation impact fees[131] as revenue raising devices and

123. *Id.* at 2601.

124. Covell v. City of Seattle, 127 Wash.2d 874, 879, 905 P.2d 324 (1995).

125. Frach v. Schoettler, 46 Wash.2d 281, 289, 280 P.2d 1038 (1955) (stating that "[r]egulatory fees paid are not subject to the constitutional restrictions on the power to tax."); Samis Land Co. v. City of Soap Lake, 143 Wash.2d 798, 805 nn.12-14, 23 P.3d 477 (2001) (those constitution limitations include the requirements under the Washington Constitution Article VII, section 1 that all taxes be uniform upon the same class of property, and under Article VII, section 2 that in any year the value of all taxes levied not exceed one percent of the true and fair value of the property taxed).

126. *Covell*, 127 Wash.2d at 884-85.

127. Teter v. Clark Cnty., 104 Wash.2d 227, 704 P.2d 1171 (1985).

128. Hillis Homes, Inc. v. Pub. Util. Dist. 1, 105 Wash.2d 288, 300, 714 P.2d 1163 (1986).

129. King Cnty. Fire Protection Dist. 16 v. Housing Auth., 123 Wash.2d 819, 872 P.2d 516 (1994).

130. Wellington River Hollow, LLC v. King Cnty, 121 Wash. App. 224, 240, 54 P.3d 213 (2002).

131. New Castle Investments v. City of LaCenter, 98 Wash. App. 224, 233-238, 989 P.2d 569 (1999) *review denied,* 140 Wash.2d 1019, 5 P.3d 9 (2000).

not regulatory fees. If characterized as taxes, charges and other fees could at least fall within the *Koontz's* generalization that they are not takings.

Even still, the characterization of charges as regulatory fees rather than taxes would not automatically subject the charges to the heightened review under *Nollan* and *Dolan*. To be subject to the nexus and proportionality requirements, the fee obligations would need to be imposed through permit conditioning under circumstances in which the obligations would otherwise constitute a *per se* taking.[132] Many charges that may be loosely characterized as "regulatory fees" are imposed to recover the costs to local governments of furnishing goods or services which directly benefit the ownership and use of property, such as "utility customer fees, utility connection fees, garbage collection fees, local storm water facility fees, user fees, permit fees, parking fees, registration fees, filing fees, and license fees."[133] Other regulatory fees are imposed to offset negative externalities of the use of land, such as fees imposed to address surface water runoff, on-site septic sewage, water quality, and aquifer protection.[134]

While such regulatory fees could be challenged on grounds that they amount to monetary exactions subject to scrutiny under the heightened standards of *Nollan, Dolan,* and *Koontz*, Washington courts have sustained each of those types of regulatory fees under standards similar to the essential nexus and rough proportionality tests. To be upheld, regulatory fees must demonstrate a "direct relationship between the fee charged and the service received . . . or between the fee charged and the burden produced by the fee payer."[135] While the "direct relationship" test of *Covell* "has not demanded mathematical precision," it sufficiently approximates the essential nexus and rough proportionality tests to allow regulatory fees sustained under *Covell* to also survive a constitutional conditions challenge under *Nollan* and *Dolan.*

The same may be said for impact fees imposed through permit conditioning. SEPA authorizes governmental agencies to condition

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132. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2600, 186 L. Ed. 2d 697 (2013) ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest, such as a bank account or parcel of real property, a *per se* takings approach is the proper mode of analysis under the Court's precedent.") (internal quotations and citations omitted).

133. Samis Land Co. v. City of Soap Lake*,* 143 Wash.2d 798, 805, 23 P.3d 477 (2001).

134. *Id.* at 811-13. The distinction between fees for governmental benefits and charges to address negative externalities is more fully explored in Hugh Spitzer, *Taxes vs. Fees: A Curious Confusion,* 38 GONZ. L. REV 335, 343-50 (2003).

135. Covell v. City of Seattle, 127 Wash.2d 874, 879, 905 P.2d 324 (1995).

governmental action upon the mitigation of a proposal's impacts.[136] In the review of land use and environmental permit applications, mitigations under SEPA are typically applied on an *ad hoc* basis and therefore could be subject to an unconstitutional conditions challenge. However, if properly exercised, mitigations under SEPA must be based upon adopted policies and tailored to mitigate identified impacts of a proposal[137] and therefore should be able to survive scrutiny under *Nollan, Dolan,* and *Koontz.*

Transportation impact fees imposed under Chapter 39.92 would likely survive an unconstitutional conditions challenge as well. Chapter 39.92 authorizes local governments to designate geographical areas to be benefited by certain transportation improvements and to impose fees on new development to fund those improvements.[138] Since the amount of any particular impact fee would be determined by a formula adopted through legislation,[139] and not calculated on a permit-by-permit basis, the unconstitutional conditions doctrine arguably would not apply. But if it did, transportation impact fees imposed under Chapter 39.92 would likely survive such heightened scrutiny since the impact fees may not exceed the amount that the local government would have determined to be "reasonably necessary as a direct result of the proposed development,"[140] a standard arguably parallel to nexus and proportionality.

IV. CONCLUSION

Washington case law presently offers practitioners wide latitude in arguing for relief under the Fifth Amendment. Our court's framework for analyzing Fifth Amendment claims has produced a body of case law that is difficult to apply, lacks predictability and conflicts with the very federal doctrine it purports to apply. Landowners, citizens, local governments and the courts would be better served by clearer, more consistent application of these authorities. For Fifth Amendment takings claims, more predictable standards would result from the state court's adoption of the federal takings test, or at least through an articulation as

136. WASH. REV. CODE §43.21C.060 (2013).

137. *Id.* ("Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter."); WASH. ADMIN. CODE § 197-11-660(1)(d) (1995) ("Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal.")

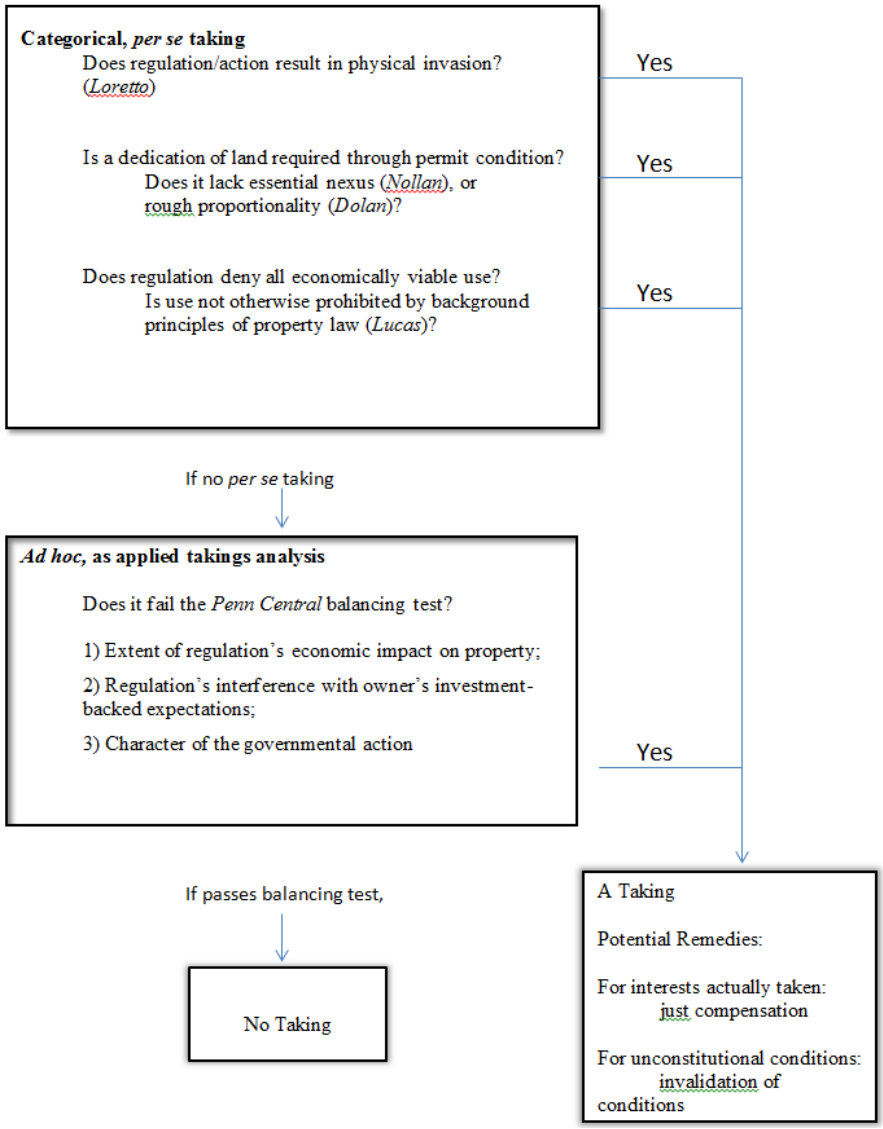
138. WASH. REV. CODE §39.92.030 (2013).

139. WASH. REV. CODE §39.92.040 (2013).

140. WASH. REV. CODE §39.92.030(4) (2013).

to how the state's own taking analysis is supported by either a *Gunwall* analysis or by independent application through Article I, Section 16 of the state constitution. As well, our state courts' application of the *Nollan* and *Dolan* standards would better conform to federal case law if limited to the doctrine of unconstitutional conditions and not expanded to serve as a test for land use legislation in general. And finally, while its full reach remains to be determined, the holding in *Koontz* would not appear to further limit the exaction of impact fees beyond what our courts have already allowed on statutory grounds.

APPENDIX A: REGULATORY TAKINGS – FEDERAL ANALYSIS



APPENDIX B: REGULATORY TAKINGS – WASHINGTON'S ANALYSIS

Categorical, *per se* takings – Washington's First Threshold Inquiry